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In The

Supreme Court of the United States

Docket No. 72-738

LOUIS PARISI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-

LOUIS PARISI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

To: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, LOUIS PARISI, respectfully requests that a writ of certiorari issue to review the judg-

ment of the United States Court of Appeals for the Second Circuit rendered on October 19, 1972, which affirmed a judgment of the United States District Court for the Eastern District of New York convicting petitioner of conspiracy and transporting forged checks and sight drafts in interstate commerce, knowing the same to have been falsely made and forged in violation of Title 18 U.S.C. Sections 371, 2314 and 2.

Opinions Below

The conviction was affirmed by the United States Court of Appeals for the Second Circuit without an opinion.

The district court wrote no opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 19, 1972. A copy is annexed hereto as Appendix A.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the petitioner's handwriting exemplars, which were introduced into evidence at trial, were seized in violation of petitioner's constitutional rights.

Statement of the Case

After a jury trial in the United States District Court for the Eastern District of New York petitioner was convicted of conspiracy and transporting forged checks and sight drafts in interstate commerce in violation of 18 U.S.C. Sections 371, 2314 and 2. The United States Court of Appeals for the Second Circuit affirmed that judgment of conviction on October 19, 1972.

At the trial, the Government introduced as evidence, a death certificate showing that a Mr. Benjamin Noden had died of natural causes on October 3, 1967.* (T18-19). Thereafter, petitioner's co-defendant, Mr. Weinstein, testified that he opened a bank account in New York, at the petitioner's request, by representing himself to be the deceased Mr. Noden. He then presented Mr. Noden's bank book and executed sight drafts thereby transferring Mr. Noden's money from a California bank to the New York bank. He also testified that he signed checks drawn on the New York bank, which he said were prepared by the petitioner, and delivered those checks to the petitioner (T51-62).

Mr. Weinstein's testimony was corroborated by a handwriting expert who testified that he compared the handwriting exemplars of the petitioner with the checks in question and found that the petitioner prepared those checks (T302-303).

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* Transcript of Trial

Argument

I.

THE PETITIONER'S HANDWRITING EXEMPLARS WERE SEIZED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS.

Samples of the petitioner's handwriting were received in evidence over defense objection (T281-282). We submit that this evidence was received in contravention of the petitioner's Fourth Amendment rights.

On December 12, 1969, an FBI Agent met petitioner at an FBI office and advised him of his rights under the Fifth Amendment to the U.S. Constitution (T277-278). Petitioner, however, was not advised of his rights under the Fourth Amendment, or more particularly, of his right to refuse to furnish handwriting exemplars at that time. In violation of these rights and in the absence of counsel the defendant was required to fill out blank checks as dictated to him by the FBI Agent (T278-283). Thereafter the petitioner was indicted under the original indictment 70 CR 717 on October 22, 1970.

When the defense objected to the receipt of this evidence (Exhibit 30) the court overruled the objection stating:

> "The law requires a person under circ-circumstances and conditions such as we have here to give specimens of his handwriting" (T279).

We submit that the court's ruling was error.

Argument

In United States v. Harris, 453 F.2d 1317 (8 Cir. 1972), a case of first impression, the Court of Appeals held that the taking of handwriting samples from a criminal suspect is a search within the meaning of the Fourth Amendment. The securing of these samples, the court said, was an examination of the person with a view to obtaining evidence of guilt, thus it must meet the Fourth Amendment's standard of reasonableness and must be preceded by some kind of warnings. The court then found that the handwriting samples taken from the defendant Long were the product of an unreasonable search and accordingly reversed the defendant's conviction.

In conflict with the Eighth Circuit's decision in Harris, however, the Second Circuit held in United States v. Doe, 457 F.2d 895 (2 Cir. 1972) that the taking of a reasonable number of handwriting exemplars did not constitute a search and seizure subject to the protections of the Fourth Amendment. In commenting upon the Harris decision the Second Circuit stated (457 F.2d at 900).

> "While the Eighth Circuit concluded that, in addition to the police-citizen encounter being a seizure, the taking of a handwriting exemplar was itself a search, we find the court's reasoning unconvincing on this point."

We submit that the Harris decision is the correct interpretation of the protections afforded by the Fourth Amendment. In any event, however,

the conflict between the Circuits of this substantial question of constitutional law should be resolved by the Supreme Court.

Conclusion

The petition for a writ of certiorari should be granted.

October , 1972

Respectfully submitted

s/ Robert L. Rosenthal
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Appendix A - Decision

(Filed October 19, 1972)

UNITED STATES COURT OF APPEALS

For the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of October, one thousand nine hundred and seventy-two.

Present: HON. WALTER R. MANSFIELD,

HON. JAMES L. OAKES,

HON. WILLIAM H. TIMBERS,
Circuit Judges,

- -

United States of America,

Plaintiff-Appellee,

v.

Matthew Weinstein, Louis Parisi and
Lynn Weinstein,

Defendants,

Louis Parisi,

Defendant-Appellant.

- -

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-738

LOUIS PARISI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on four counts of having transported forged checks in interstate commerce in violation of 18 U.S.C. 2314 and of having conspired to commit those substantive offenses in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of three years' imprisonment on each count pursuant to the provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed without opinion.

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The evidence showed that on October 16, 1967, Matthew Weinstein [1] opened a checking account at a New York bank in the name of Benjamin H. Noden. He testified that he opened this account at petitioner's request using money supplied by petitioner. Benjamin H. Noden was deceased at this time, having died of natural causes on October 3, 1967. Petitioner subsequently supplied Weinstein with three checkbooks from banks in California for accounts in the name of Benjamin H. Noden. Weinstein executed sight drafts in Noden's name directing the banks to transfer the balance of the accounts to the New York account. Petitioner then had Weinstein sign blank checks in Noden's name which petitioner subsequently completed and cashed (Tr. 15–16, 47–62, 133–142, 375–388, 397, 402–408, 414, 424).[2] Weinstein's testimony was corroborated by a handwriting expert who testified that he compared exemplars of petitioner's handwriting with the checks in question and concluded that petitioner had prepared those checks (Tr. 302–303).

Petitioner's sole contention is that the handwriting exemplars were obtained in violation of the Fourth Amendment and therefore should not have been admitted into evidence at trial. The exemplars were obtained on December 12, 1969, when petitioner met with Agent Larson of the F.B.I. at the F.B.I. office

[1] Matthew Weinstein was indicted with petitioner; he pleaded guilty to the conspiracy count prior to trial and testified as a government witness at trial.

[2] "Tr." refers to the reporter's transcript of the proceedings at trial.

in Morristown, New Jersey. Petitioner was not under arrest at this time nor was he in custody. Agent Larson, however, informed petitioner of his rights by reading the rights and waiver form to him. Petitioner then read the form and signed it, indicating he understood the contents (Tr. 276–278). Petitioner thereafter furnished handwriting exemplars as Agent Larson gave him blank check forms and asked him to fill them in while Larson dictated the information. Larson testified that petitioner "cooperated fully," and "voluntarily" gave the samples (Tr. 276–283, 288–289).

Relying on *United States* v. *Harris,* 453 F. 2d 1317 (C.A. 8), petition for a writ of certiorari pending (No. 71–6416), petitioner argues that the taking of handwriting exemplars constituted a search and seizure prohibited by the Fourth Amendment and that, since he was not specifically informed that he could refuse to give the writing samples, his consent could not have been voluntary.

Petitioner's reliance on *Harris, supra,* is misplaced. There the Eighth Circuit held that handwriting exemplars obtained from a juvenile who was not in custody or under arrest at the time were admissible; the court specifically rejected a contention similar to the one petitioner makes: that consent to the giving of exemplars had to be found involuntary in the absence of warnings to the youth or his parents that he could refuse the request. *Harris, supra,* 453 F. 2d at 1321–1322. That court did hold in a case joined with *Harris* for appellate decision (*United States* v. *Long*) that a district court had properly found as a

matter of fact that the defendant had not freely consented to the furnishing of exemplars where he was improperly in custody at the time, had invoked his Fifth Amendment privilege under *Miranda* v. *Arizona*, 384 U.S. 436, but had not been provided an attorney as he requested, *and* had not been advised that he could refuse to give the writing samples. See *Harris, supra*, 453 F. 2d at 1322–1323.

Those facts, of course, bear no resemblance to what took place in the present case. Here petitioner was not under arrest or in custody. Moreover, he had received his full *Miranda* warnings before providing the exemplars, and knew he could summon his attorney at any time, but he did not elect to do so. Petitioner does not suggest that he gave the exemplars due to any coercion or duress. In this situation petitioner's voluntary writing of the exemplars made them admissible at trial, and the decision below in no way conflicts with the decision of the Eighth Circuit in *Harris* and *Long, supra*.[3]

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[3] Contrary to petitioner's contention there is no conflict between the Eighth Circuit's holding in *Harris*, *supra*, and the ruling of the Second Circuit in *United States* v. *Doe*, 457 F. 2d 895. *Doe* deals with the compulsory production of handwriting exemplars pursuant to a grand jury subpoena and is currently pending on petition for a writ of certiorari *sub nom. Cynthia Schwartz* v. *United States*, No. 71–6522. The propriety of requiring exemplars for use by a grand jury is presently pending before the Court in *United States* v. *Dionisio*, No. 71–229, and *United States* v. *Mara*, No. 71–850, both argued November 6, 1972. There is no reason to hold this case pending the outcome in *Dionisio* and *Mara* since here the exemplars were

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It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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voluntarily given after *Miranda* warnings, and not sought pursuant to a grand jury subpoena.

The question whether consent to the search of an automobile was involuntary because not preceded by advice that consent could be withheld is before the Court in *Schneckloth* v. *Bustamonte*, No. 71-732, argued October 10, 1972. The Second Circuit in *Doe* (*Schwartz*) concluded that the taking of handwriting exemplars is not a "search" at all, since a person normally has no expectation of privacy in his handwriting. The relevant Fourth Amendment question, in the Second Circuit's view, is whether the underlying police-citizen encounter is a lawful "seizure" of the person. In the present case, there is no contention that petitioner's appearance at the F.B.I. office for an interview was involuntary or illegal.

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